

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**NICO ASPHALT PAVING, INC. and
CITY WIDE PAVING, INC.**
Respondents

and

**UNITED PLANT & PRODUCTION WORKERS,
CC LOCAL UNION 175**
Charging Party

Case 29-CA-186692

**HIGHWAY, ROAD AND STREET CONSTRUCTION
LABORERS LOCAL 1010, LIUNA, AFL-CIO**
Party in Interest

Francisco Guzman, Esq.
for the General Counsel,
Michael T. Scaraggi, Esq.
for Nico Asphalt Paving, Inc.
and City Wide Paving, Inc.
Eric Chaiken, Esq.
for the Charging Party
Andrew Gorlick, Esq.
for the Party in Interest

EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE,
JEFFREY P. GARDNER DATED NOVEMBER 2, 2018

Michael T. Scaraggi, Esq.
Counsel for the Respondents
Oransky, Scaraggi & Borg, P.C.
175 Fairfield Avenue, Suite 1A
West Caldwell, NJ 07006
(973) 364-1200

This law firm represents the Respondents, Nico Asphalt Paving, Inc. (“Nico”) and City Wide Paving, Inc. (“City Wide”) with regard to Exceptions to the Decision of Administrative Law Judge, Jeffrey P. Gardner, dated November 2, 2018.

1. Exception No. 1

The ALJ at page 4, lines 40-45 of the record transcript under the heading “Nico’s Relationship with Local 175” stated as follows:

“It is also undisputed that Nico has acknowledged the Union’s representation of its employees, and had been honoring the terms of the parties’ CBA until the events at issue in this case. It is also undisputed that Nico did not give the required notice to terminate its NYICA agreement prior to the most recent Local 175 CBA. And, under the evergreen clause in the applicable bargaining agreements with the Union, unless terminated in writing at appropriate times, those agreements automatically renew themselves.”

At page 39, Volume 1 of the hearing transcript beginning at line 16, respondent counsel stated that Michael Pietranico, Sr. had provided notification to NYICA [employer association] that it no longer had the authority to negotiate any further collective bargaining agreements.

At page 43-44, Volume 1, of the hearing transcript beginning at line 22, counsel for the Local Lodge CC 175, IAM & Aerospace Workers, AFL-CIO (hereafter Local 175) stated as follows:

“In January 2016—oh, excuse me, in December of 2015, Mr. Pietranico himself resigned as a board member of the New York Independent Contractors Association, and at the same time wrote a letter saying NYICA no longer represented them for collective bargaining purposes.”

At page 480, Volume 4 of the hearing transcript beginning at line 4 regarding respondent exhibit R-4 which comprised a packet of documents (lines 5-6) including the following:

A. Letter from Michael Pietranico to the New York Independent Contractors Alliance resigning his board seat (lines 12-14) including date of resignation, December 2, 2015 (lines 15-16).

B. The letter includes reference to withdrawal of collective bargaining rights from NYICA (page 481, lines 15-16 and lines 23-25, page 482 lines 1-2).

C. Respondents’ Exhibit R-4 was admitted into evidence (page 486 lines 22-23).

Attached to and made part of this exception is a copy of Exhibit R-4 which comprises a packet of documents including:

1. Letter of Michael Pietranico resigning his Board Seat; (Exhibit A);
2. Letter dated December 2, 2015 withdrawing collective bargaining rights of NYICA; (Exhibit B));
3. Letter dated December 29, 2015 to NYICA; (Exhibit C);
4. Letter dated January 18, 2017 to United Plant and Production Workers Local 175 terminating collective bargaining agreement. (Exhibit D).

RESPONSE: It is evident from the record that Nico and Pietranico did in fact resign from and terminate the authority of NYICA to further negotiate with Local 175 on behalf of Nico. It is also evident from the record that Nico did terminate its collective bargaining agreement in a timely fashion with Local 175. The ALJ made no reference to consideration of Exhibit R-4.

2. Exception No. 2

The ALJ at page 13, beginning at line 5 of the record transcript under the heading:

“City Wide Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain with the Union and by Failing to Apply the Collective Bargaining Agreement in Existence Between the Union and Nico”

Stated as follows:

“It also cannot be disputed that Nico never timely terminated the agreement it had with NYICA, which by its terms renewed itself unless written notice of termination was given. Thus that agreement and Nico’s agreement with the Union continued in effect, and is binding on City Wide. City wide’s refusal to recognize and bargain with Local 175 violates the Act.”

As stated and provided above Exhibits A through D attached provide documentation contrary to the findings of the ALJ.

RESPONSE: As stated above evidentiary Exhibits A through D attached provide documentation contrary to the findings of the ALJ. Again, the ALJ made no reference to Respondents’ Exhibit R-4.

3. Exception No. 3

The ALJ under the heading “Intent to Evade the Act” (page 11 of the record) stated at page 12, lines 10-15 of the record as follows:

“Moreover, to whatever extent Respondents’ motivation was instead of seeking to avoid economic losses that might result from a potential inability to perform ConEd work, it was not privileged to unilaterally establish an alter ego, without notifying and bargaining with the Union over that in advance. The Board does not permit an employer to avoid its obligations under the Act even if facing a potential loss of customers.”

At page 146 Volume 2 of the Hearing Transcript, lines 3-5, Mr. Pietranico, the Principal of Nico, went to Roland Bedwell, Business Agent for Union No. 175, expressing the need to join the BTC, see also lines 12-13 and 20-21 regarding additional conversations with Mr. Bedwell named as Business Agent for Local 175.

RESPONSE: The record at the hearing provided testimony from the corporate president and principal of Nico that there were indeed conversations with Roland Bedwell as Business Agent for Local 175 regarding the fundamental issues of the case, namely, Local 175’s inability to join the BTC.

4. Exception No. 4

Again at page 522, Volume 4 of the Hearing Transcript, lines 7-25, additional reference to multiple conversations with Roland Bedwell, Business Agent for Local 175 regarding joining the BTC.

Again beginning at page 522 Volume 4 of the Hearing Transcript, line 25 continuing to page 523 lines 1-5, regarding conversation with Mr. Bedwell by Mr. Pietranico indicating that his family would start City Wide to keep their jobs to do ConEd’s work.

Again at page 529 lines 10-19, conversation with Mr. Pietranico and Mr. Bedwell regarding starting another company with a different name to perform ConEd work. See also lines 20-24.

RESPONSE: Additional references in the Hearing Transcript which refer to multiple conversations with Roland Bedwell, Business Agent for Local 175 to join the BTC including specific references to warnings that a new entity (City Wide) would be established to comply with the ConEd contract requirement.

Respectfully submitted:


MICHAEL T. SCARAGGI, ESQ.
Attorney for Respondents

Dated: November 26, 2018

cc: *Francisco Guzman, Esq.*
for the General Counsel,
Eric Chaiken, Esq.
for the Charging Party
Andrew Gorlick, Esq.
for the Party in Interest

EXHIBIT

A

Michael Pietranico
341 Nassau Avenue
Brooklyn, NY 11222
November 30, 2015

New York Independent Contractors Alliance Inc
1902 Whitestone Expressway, Suite 301a, 3rd Floor
Whitestone, NY 11357
Attn. Jim Kilkenny

Re: Board Seat

Dear Mr. Kilkenny,

I, Michael Pietranico, of 341 Nassau Avenue, Brooklyn, NY 11222 hereby resign my Board Seat as of Wednesday, December 2, 2015 at Midnight.

I will return any and all materials my in possession and I will not discuss any Board issues with anyone as of Midnight on Wednesday, December 2, 2015.

Sincerely,



Michael Pietranico

Signed and Subscribed to
Before me this 30th day
Of November 2015.


Notary Public

JOHN P. DENEGALL, JR.
Notary Public, State of New York
No. 01DE5073046
Qualified in Queens County
Commission Expires Feb. 10, 2019

EI453344542US

EXHIBIT

B

ORANSKY, SCARAGGI & BORG, P.C.

ATTORNEYS AT LAW

175 FAIRFIELD AVENUE, SUITE 1A
WEST CALDWELL, NJ 07006

TEL.: (973)364-1200
FAX: (973)364-0211
www.erisalawoffice.com

MICHAEL T. SCARAGGI
(Also Admitted D.C. Bar)
michaelscaraggi@netscape.net

EMANUEL ORANSKY
(1933 - 2008)

ANDREW D. BORG
(Also Admitted N.Y. Bar)
andrewborg@msn.com

December 2, 2015

VIA OVERNIGHT MAIL

New York Independent Contractors Alliance, Inc.
Attn.: Jim Kilkenny
1902 Whitestone Expressway, Suite 301a, 3rd Floor
Whitestone, NY 11357

Re: Nico Asphalt Paving, Inc.

Dear Mr. Kilkenny:

This office represents Nico Asphalt Paving, Inc. (NICO). I have been provided with a copy of a letter sent to you containing the resignation of Michael Pietranico from the Board effective December 2, 2015 at midnight. I have been authorized to inform you that NYICA is no longer authorized to negotiate any matters related to a collective bargaining agreement with United Plant and Production Workers Local 175 or any other trade union effective immediately.

In connection with ongoing issues related to NICO and Local 175 I am requesting that you provide me with any documents which reflect an assignment of collective bargaining rights from Nico to NYICA as well as copies of, if any, extensions of the collective bargaining agreement between NYICA and Local 175 which had an expiration date of June 30, 2014.

Thank you for your cooperation in this matter.

Very truly yours,

MICHAEL T. SCARAGGI

MTS:lc

cc: Nico Asphalt Paving, Inc. – via regular mail
United Plant and Production Workers Local 175 – via regular mail

EXHIBIT

C

ORANSKY, SCARAGGI & BORG, P.C.

ATTORNEYS AT LAW

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(Also Admitted D.C. Bar)
michaelscaraggi@netscape.net

EMANUEL ORANSKY
(1933 - 2008)

ANDREW D. BORG
(Also Admitted N.Y. Bar)
andrewborg@msn.com

December 29, 2015

VIA OVERNIGHT MAIL

New York Independent Contractors Alliance, Inc.
Attn.: Jim Kilkenny
1902 Whitestone Expressway, Suite 301a, 3rd Floor
Whitestone, NY 11357

Re: Nico Asphalt Paving, Inc.

Dear Mr. Kilkenny:

I wrote to you on December 2, 2015 enclosed is a copy of my letter for your reference. I requested from you documents which in written form reflected an assignment of collective bargaining rights from Nico Asphalt to NYICA. I requested from you written confirmation of any extension to the collective bargaining agreement between NYICA and Local 175 which had an expiration date of June 30, 2014. None of the documents requested have been provided. I am now renewing my request and putting you on notice that my Client will suffer irrevocable harm if not provided in a timely fashion.

Very truly yours,

MICHAEL T. SCARAGGI

MTS:et
Enclosure

cc: Nico Asphalt Paving, Inc. – via regular mail
United Plant and Production Workers Local 175 – via regular mail

EXHIBIT

D

ORANSKY, SCARAGGI & BORG, P.C.

ATTORNEYS AT LAW

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WEST CALDWELL, NJ 07006

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FAX: (973)364-0211
www.erisalawoffice.com

MICHAEL T. SCARAGGI
(Also Admitted D.C. Bar)
michaelscaraggi@netscape.net

EMANUEL ORANSKY
(1933 - 2008)

ANDREW D. BORG
(Also Admitted N.Y. Bar)
andrewborg@msn.com

January 18, 2016

VIA OVERNIGHT MAIL

United Plant and Production Workers
Local 175
99 Mineola Avenue
Roslyn Heights, NY 11577

Re: *Collective Bargaining Agreement*

Please Take Notice:

This law firm represents Nico Asphalt Paving, Inc.. On several occasions Nico Asphalt Paving, Inc. has requested copies of written confirmation of its assignment of collective bargaining rights to the New York Independent Contractors Alliance Inc. (NYICA). In addition, requests were made for written confirmation if any of any written collective bargaining agreements between United Plant and Production Workers, Local 175 and any authorized extensions of any CBA's between the parties. All requests as of this date have been ignored and unanswered. On December 2, 2015 written notice was provided to NYICA of Nico Asphalt Paving Inc. revocation of bargaining rights effective immediately.

Nico Asphalt Paving Inc. now provides notice that it will not renew the collective bargaining agreement negotiated between NYICA and Local 175 effective midnight June 30, 2016. Nico Asphalt Paving, Inc. hereby provides notice that the CBA between NYICA and Local 175 will be deemed terminated as of June 30, 2016.

Nico Asphalt Paving, Inc. will not consider itself bound to any Agreement and Declaration of Trust for any and all employee benefit funds which may have been negotiated between NYICA and Local 175.

Finally, Nico Asphalt Paving, Inc. is requesting copies of all dues check-off authorizations which were required to be executed by employees of Nico Asphalt Paving Inc. who may have been members or non-members of Local 175 which were required to be obtained by Local 175 from 2006 to date.

Very truly yours,

MICHAEL T. SCARAGGI

MTS:et

cc: New York Independent Contractors Alliance – via overnight mail
Nico Asphalt Paving, Inc. – via overnight mail